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Supreme Court, U.S.
FILED
NOV 22 1991
OFFICE OF THE CLERK

No. 91-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

T. HARRIS YOUNG & ASSOCIATES, INC.,
Petitioner,

v.

MARQUETTE ELECTRONICS, INC.,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a tying arrangement exists where the purchaser already owns the alleged tying product and the defendant does not, expressly or impliedly, condition the sale of the tying product on the purchase of the tied product or withhold, or threaten to withhold, the tying product unless the purchaser also purchases the tied product.

2. Whether the Appellate Court, having determined that plaintiff "failed to produce admissible evidence sufficient to support a rational jury determination of tortious interference with businesses" (51a) erred in ordering that JNOV be entered for defendant.

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STATEMENT OF THE CASE

I. Proceedings Below

A. The Claims Asserted in the Complaint

Petitioner, T. Harris Young & Associates, Inc. ("THY"), is a distributor of heat sensitive recording paper which is used in electrocardiograph ("EKG") and stress testing machines. THY distributes such paper to medical clinics, physicians, and hospitals, in a nine state region in the Southeastern United States.[1] (31a)

[1] THY does business in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Virginia and Tennessee. (31a)

Respondent, Marquette Electronics, Inc. ("Marquette"), is a Wisconsin manufacturer of EKG and stress testing equipment. Marquette also produces and distributes recording paper for use in its medical equipment. (31a)

In 1987, THY filed suit claiming that Marquette 1) tied recording paper (tied product) to EKG and stress testing equipment (tying products) in violation of §1 of the Sherman Act (15 U.S.C. §1); 2) monopolized an alleged relevant market for recording paper sold to general hospitals with 200 or more beds located in THY's nine state region in violation of §2 of the Sherman Act (15 U.S.C. §2); and 3) tortiously interfered with THY's business relations under state law. (30a)

B. Proceedings in the Trial Court

The jury returned a verdict for THY on all three claims. The District Court entered judgment for THY on the tort claim, but it granted Marquette's motion for JNOV on the tying and monopolization claims. (12a, 14a, 26a)

With regard to the tying claim, the District Court held that proof of market power over the tying product was a requisite element of a *per se* violation. (23a, 27a) Because THY had failed to define the markets for EKG and stress testing equipment or prove that Marquette enjoyed market power in such markets, the District Court held that no *per se* illegal tying claim had been proved. (23a)

With regard to the rule of reason, the District Court held that THY had failed to define a market for the tied product, which THY alleged to be recording paper sold to 200+ bed general hospitals located in THY's nine state region. (18a-21a) Because no market for recording paper had been defined, the District Court held that there was no way to determine whether an unreasonable effect on

competition within that market had occurred. (23a) Accordingly, the District Court held that THY failed to prove a rule of reason tying violation and entered JNOV for Marquette on the tying claim. (23a)

As to the monopolization claim, the District Court held that because THY failed to define a relevant market for recording paper, the monopolization claim must fail. (18a-21a) Accordingly, the District Court entered JNOV for Marquette on this claim, too. (23a-24a)

C. The Appeal

THY appealed the entry of JNOV for Marquette on the tying and monopolization claims. Marquette cross appealed from the denial of its motion for JNOV on the tort claim.

The Appellate Court rejected THY's tying claim on even more fundamental grounds than had the trial court. The Appellate Court held that for a tying arrangement to exist, a seller must condition the sale of the tying product on the purchase of the tied product or, stated differently, "withhold product A unless the buyer also selects product B". (36a, 37a) Contrary to THY's repeated assertion (Pet. i,1,7,8,9,10), the Appellate Court did not hold that the conditioning or withholding of the tying product had to be express, rather than implied.

The Appellate Court then noted that THY had not even *alleged*, much less proved, that Marquette withheld, or threatened to withhold, EKG or stress testing equipment from any purchaser unless the purchaser also bought Marquette recording paper. (39a)[2] The Appellate Court there-

[2] THY claims that the Appellate Court was mistaken in stating that it did not even allege that Marquette withheld or threatened

(Footnote continued on following page)

fore held that THY had failed to prove the existence of a tying arrangement and that judgment for Marquette had been properly entered.

As to the monopolization claim, the Appellate Court held that the relevant product market for recording paper could not, as THY had argued, be restricted to one class of customer—i.e., 200+ bed general hospitals. (41a-45a) The Appellate Court also rejected THY's contention that the relevant geographic market for recording paper could be limited to THY's nine state region. (40a-41a) Specifically, the Appellate Court held:

> THY presented no evidence that could support an inference that consumers within the nine state area could not turn to outside sellers if the prices increased within the nine state area. In fact, the evidence indicated that consumers could and did turn to outside suppliers . . . Moreover, 6 of the 13 suppliers of Marquette or Marquette compatible paper to customers in the nine state area were from outside the southeast area. (41a)

The Court, therefore, affirmed the grant of JNOV for Marquette on the monopolization claim. (41a, 44a-45a)

As to the tort claim, the Appellate Court reversed the judgment in THY's favor and held that JNOV should have been entered for Marquette on that claim, too. The Appellate Court noted that even though THY asserted

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[2] *continued*

to withhold EKG or stress testing equipment unless the purchaser also bought Marquette recording paper. (Pet. 7, at n. 5) THY then quotes from its complaint, but the quoted material does not even come close to "alleging" that Marquette withheld, or threatened to withhold, equipment from any purchaser who did not also buy recording paper. The quoted material merely states that Marquette threatened to void warranties on equipment which the purchaser *already* owned.

"extensive region-wide interference" with its business (45a), it attempted to prove tortious conduct "at only a small number of hospitals". (46a) The Court then held that *all* of the evidence of the supposedly tortious statements made at those hospitals was inadmissible hearsay and should have been excluded at trial. (45a-53a)

Contrary to THY's assertions (Pet. i,10,14,15), the Appellate Court did not re-weigh any evidence or assess the credibility of any witness. Rather, the Appellate Court held 1) that even though THY had "produced reams of trial transcripts and evidence" (51a), it had "failed to produce admissible evidence sufficient to support a rational jury determination of tortious interference with business" (51a) and 2) that the District Court erred in denying Marquette's motion for JNOV on the tort claim. (51a-52a)

II. THY's Petition For Certiorari

THY asks this Court to review two issues. The first relates to the tying claim and the second relates to the tort claim. THY does not seek review of the entry of JNOV for Marquette on the monopolization claim.

A. Petitioner's Question Presented on the Tying Claim

THY asks this Court to review whether it proved the existence of a tying arrangement. According to THY, the Appellate Court's ruling that a tie does not exist unless defendant withholds, or threatens to withhold, the tying product conflicts with *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) and numerous Circuit Court of Appeals decisions.

Significantly, THY does not seek review of the Appellate Court holding that THY failed to define relevant markets for the tying products (EKG and stress testing

equipment) and failed to prove that Marquette possessed market power in those markets. Nor does THY seek review of the Appellate Court holding that it failed to define a relevant market for the tied product (recording paper) or prove an unreasonable effect on competition in that market. (19a-21a, 23a, 39a-45a)

B. Petitioner's Question Presented on the Tort Claim

THY requests the exercise of this Court's supervisory power to review the Appellate Court's holding that JNOV should have entered for Marquette on the tort claim. According to THY, the hearsay rulings (which THY does not here challenge) could not justify the entry of JNOV. Furthermore, THY claims the Appellate Court applied an improper standard of appellate review in holding that it "failed to produce admissible evidence sufficient to support a rational jury determination of tortious interference". (Pet. 51a) Thus, THY claims the Appellate Court should have ordered a new trial, rather than granting JNOV for Marquette.

In making this argument, THY fails to mention that it neither raised nor preserved this issue below. Indeed, in contending that it argued on appeal that the erroneous admission of the hearsay evidence only justified a new trial and not JNOV, THY cites only to its "Supplement" to its petition for rehearing en banc (Pet. 8; *see*, 54a)[3] The

[3] THY's petition for rehearing was due on June 11, 1991, and was timely filed. Ten days later, on June 21, 1991, THY filed a pleading captioned "Supplement to Suggestion of Rehearing *En Banc* and Petition for Rehearing" without seeking leave of court to do so. (54a) When Marquette objected to the filing of this pleading, THY moved, on June 27, 1991, for leave of court to file it,

(Footnote continued on following page)

"new trial" issue which THY argues to this Court was not raised during the main appeal to the Eleventh Circuit. Thus, the issue was not preserved in the Appellate Court and cannot be asserted here.

III. Statement of Facts

A. The Allegedly Wrongful Conduct

It was THY's theory that Marquette told all of the 200+ bed general hospitals in its nine state region that non-Marquette paper would damage Marquette equipment and that Marquette warranties and service contracts would be voided if the customer bought non-Marquette paper. On that basis, THY claimed that Marquette had committed "an extensive region wide" tort and tied recording paper to EKG and stress testing equipment. (31a-32a; 45a)

At trial, however, THY identified only eight hospitals where this allegedly wrongful conduct supposedly took place. For six of these hospitals, the only evidence of any allegedly wrongful conduct was in the testimony of Cynthia Cherry and William Lofdahl. (46a)[4] The Appellate

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[3] *continued*
(ra1; "ra__" references are to respondent's appendix) which Marquette opposed. (ra5) On August 30, 1991, the Appellate Court denied THY's Petition for Rehearing and Suggestion of Rehearing *En Banc*. (56a) On September 10, 1991, the Appellate Court denied the "Supplement to Suggestion of Rehearing *En Banc* and Petition for Rehearing." (ra12).

[4] Ms. Cherry testified as to events at 1) the V.A. hospital in Ashville, North Carolina (46a-47a); 2) the Myrtle Beach Air Base Hospital (47a, n. 21); 3) East Jefferson Hospital (48a, n. 21); 4) Betsy Johnson Hospital (id); and 5) Trident Regional Medical Center (id). Mr. Lofdahl also testified as to events at the V.A. Hospital in Ashville and added to the list a sixth hospital, Davie County Hospital in North Carolina. (48a)

Court, however, held their testimony to be inadmissible hearsay. (46a-53a)[5] THY does not seek review of that evidentiary ruling.

The seventh identified hospital was Wake Medical Center. Michael Marrow testified as to events at that hospital. (49a) The Appellate Court held his testimony, too, to be inadmissible hearsay. (id)

The eighth, and final, hospital was North Broward Medical Center. The testimony as to the events at that hospital came from Sharon Popeil. Her testimony was not hearsay, but as the Appellate Court held, it did not support THY's factual contentions. Ms. Popeil testified that she had independently concluded that THY's paper "was causing our machine to break down". (52a, n. 24) She further testified that after switching to Marquette paper, the problems with the machine stopped. (id)

The only other evidence of any allegedly wrongful conduct came from Mr. David Taylor.[6] It is Mr. Taylor's tes-

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[5] With regard to the events at the V.A. Hospital in Ashville, THY also introduced the testimony of Sally Morrell. Her testimony, too, was held to be hearsay. (48a, n. 22)

[6] THY also cites the testimony of Mr. Charles Brinkley. (Pet. 16, n. 8) He is the gentleman from the V.A. Hospital whose out of court declaration Cynthia Cherry related in her hearsay testimony. Ms. Cherry testified that Brinkley told her that a Marquette employee had told him that Marquette equipment would be damaged and the "warranty would be completely voided if the hospital used anything but Marquette brand paper". (46a) When Mr. Brinkley took the stand to speak for himself, however, he testified to no such thing. Rather, Mr. Brinkley testified that all he was told by Marquette was that "some types of paper had caused problems with printheads and that warranty coverage would not be provided where such problems occurred". (51a, n. 24) He also testified that Marquette employees told him "it might be possible to use all different types of papers". (id) Not even THY contends that such statements are wrongful. Incredibly, THY continues to rely on Mr. Brinkley's testimony. (Pet. 16)

timony on which THY principally relies. (Pet. 15) THY claims that Taylor's testimony is "direct evidence of Marquette's practice of tortious interference" and that the Appellate Court "improperly weighed" his testimony and assessed his credibility. (id)

Taylor testified that a Marquette employee, Mr. Terry Johnson, told him that he (Johnson) told Marquette salesmen to tell customers that their warranty or service contracts would be "no good" if the customer used non-Marquette paper. (52a, n. 24) As the Appellate Court points out, however, Taylor admitted that he had no idea whether any Marquette salesman actually made this statement to any hospital. (id) Furthermore, as the Appellate Court noted, Taylor contradicted his own testimony when he testified that Johnson only told him that he (Johnson) told Marquette salesmen to tell the customers that if a printhead burned out and the customer was using non-Marquette paper, then the printhead would not be replaced under the warranty. (52a-53a, n. 24)

Other than the inadmissible hearsay evidence discussed above, THY presented *no* evidence that any wrongful statement was actually made at any hospital.

B. The Product and Geographic Markets for EKG and Stress Equipment

Marquette is one of nine manufacturers of EKG machines and one of eighteen manufacturers of stress testing equipment in the United States. (30a-31a) Nevertheless, petitioner asserts that Marquette enjoys "a dominant position in both the markets for EKG and stress testing equipment". (Pet. 2) The District Court, however, rejected this contention (23a, 27a) and THY cites only the flawed and twice rejected (18a-21a; 39a-45a) study of its expert, Prof. Rubin, in support of it.

Prof. Rubin merely assumed that EKG machines competed only with EKG machines and that stress testing equipment competed only with stress testing equipment. He admitted he did not study what other products, procedures, or equipment were reasonably interchangeable with these machines or whether close substitutes existed for them. Nor did he study the cross-elasticity of demand between these machines and other products. (R16-593-94)

Prof. Rubin's market investigation consisted of a telephone survey of 200+ bed general hospitals in THY's nine state region. (Px125, 1-4) All other equipment buyers, such as specialty hospitals, clinics, physicians, and small hospitals, were excluded from the survey. (R18-196; R22-1405-06)[7] Furthermore, although the survey was limited to THY's nine state region, there was no proof, or even the contention, that equipment purchasers in that region could not look to sellers outside of the region for their supply of EKG or stress testing equipment.[8] In fact, Marquette is located in Milwaukee and the other equipment manufacturers are also located outside of the Southeast. (Dx175; Dx132) Rubin nonetheless restricted the survey

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[7] Rubin's explanation for excluding all buyers except 200+ bed general hospitals from the market survey was that the plaintiff had indicated to him that 200+ bed general hospitals were the appropriate market. (R16-510)

[8] If buyers in the Southeastern region can realistically and practically look to sellers of equipment located outside of the Southeast then the Southeast is not a relevant geographic market and a survey which only includes buyers within that area has no antitrust significance. *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

to the Southeast because that is the territory in which THY did business. (R16-530-31, 550-51, 555-51)[9]

On the basis of this survey, petitioner claims that 47% and 41% of the large hospitals used Marquette EKG and stress testing equipment, respectively, as their "primary" brand of equipment. (Pet. 3) The data behind this contention comes from asking 200+ bed general hospitals in the nine state region: "what is your primary brand of EKG [or stress testing] equipment?" (Px125, app. p. 2) The word "primary" was not defined for the interviewee and Rubin admitted that a hospital with seven machines, two of which were Marquette and five of which were manufactured by five other companies, would answer that its "primary" brand of machines was Marquette. (R16-557-66; R25-447-78) Thus, Rubin was forced to admit that from his survey data, he could not compute the percentage of the machine population that was Marquette. (R-25-477-78; R16-522-23, 551-52, 557-58, 560, 589-90) Nor did Rubin know what Marquette's current or historic market share of annual machine sales was. (Px125)

C. The Product and Geographic Markets for Recording Paper

Prof. Rubin also claimed that the recording paper product market should be limited to 200+ bed general hospitals. (42a-43a) This claim was made even though THY and Marquette sold identical recording paper at the same prices to clinics, doctors, smaller hospitals and specialty

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[9] When asked if he had determined whether THY's territory was "an area of effective competition for equipment", Rubin could only answer that "this was the market or territory that [THY] had been assigned". (R16-550) Indeed, he stated that the geographic scope of the effective competition is a "moot point". (Px129, p.23)

hospitals. (34a, 43a, n. 16; R18-196; R22-13, 14-15) Both lower courts held that limiting the recording paper market to only 200+ bed general hospitals was erroneous as a matter of law. (41a-45a; 18a-21a)

As to the geographic market for recording paper, THY again sought to limit the scope to its nine state Southeastern region. The uncontradicted evidence, however, was that prices of recording paper inside and outside the nine state territory were virtually identical. (33a; 41a) All suppliers relied on UPS or similar common carriers to deliver paper and the difference in transportation cost between sellers inside and outside of the nine state region was a trivial percentage of the total cost of the paper. (id) As a result, six out of thirteen sellers of recording paper in the Southeast, including Marquette, were from outside that purportedly relevant geographic market. (33a-34a, n. 7) Thus, the Appellate Court held that "THY presented no evidence that could support an inference that consumers within the nine-state area could not turn to outside sellers if the prices increased within the nine-state area." (41a)

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

In order to demonstrate the existence of a tying arrangement, plaintiff must prove that defendant agreed to sell the tying product only on the condition that the purchaser also purchases the tied product. Here, THY neither alleged nor proved that Marquette ever withheld, threatened to withhold, or conditioned the sale of equipment on the purchase of recording paper. Indeed, the purchasers of paper already owned equipment at the time of the alleged tying conduct. The holding below, that under these

circumstances no tie exists, is not in conflict with any decision of any Court. No case has ever held tying exists when defendant has neither expressly nor impliedly withheld the tying product.

Even if this Court were to review and reverse the holding that no tie was shown to exist, judgment would still necessarily enter for Marquette on the tying claim. This is because the lower courts have held, and THY does not here challenge, that THY failed to define the markets for the tying and tied products; and, failed to prove Marquette possessed market power in the tying product markets or unreasonably injured competition in the tied product market. Accordingly, THY cannot prevail on its tying claim, as a matter of law, under either the *per se* rule or the rule of reason. Any decision on the tying question presented for review would, therefore, be advisory in nature.

Contrary to THY's assertion, this case bears no similarity to any issue which will be reviewed in *Image Technical Service*. In that case, spare parts are alleged to be the tying product and the issue for review is whether a manufacturer with no market power over equipment can, nonetheless, have meaningful market power over spare parts for that equipment. That issue is totally unrelated to the tying issue presented by petitioner.

THY claims that the exercise of this Court's supervisory power is required because the Appellate Court granted JNOV on the state law tort claim instead of ordering a new trial. Review of the disposition of the tort claim is inappropriate for three reasons. First, THY failed to raise the issue below of whether Marquette was only entitled to a new trial, as opposed to JNOV, and it may not properly raise that issue now. Secondly, the question of whether the facts in this case are sufficient to allow a reasonable

juror to return a verdict for THY is of no general legal significance and will be of consequence only to the immediate parties hereto. Thirdly, it is clear that under the substantive tort law of Florida, THY's evidence, both admissible and inadmissible, is insufficient to create a jury question as to whether the alleged tort was proved. JNOV for Marquette was, therefore, not only proper, but required.

I. Reasons For Denying Review of the Tying Claim

THY argues that review of the Appellate Court's holding that no tie was shown to exist is appropriate for two reasons. First, THY claims that the decision conflicts with numerous decisions of this Court and other appellate courts. Secondly, THY claims this case is similar to *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2823 (June 17, 1991).

These contentions are without merit. As Marquette demonstrates below, (1) the decision of the Appellate Court is not even arguably in conflict with the decision of any court; (2) even if the existence of a tie were reviewed and reversed, other holdings below would preclude THY from recovering on the tying claim, and any decision by this Court on the tying question presented for review would be advisory in nature; and (3) contrary to THY's contention, this case bears no similarity whatsoever to *Image Technical Service*.

A. The Appellate Court Decision Does Not Conflict With Any Decision of this Court or any Other Appellate Court

Tying occurs when a seller refuses to sell the tying product (here equipment) except on the condition that the

customer also purchases the tied product (here paper). If the buyer "is free to take either product by itself there is no tying problem." *Jefferson Parish*, 466 U.S. 2, 11, n. 17 (1984). As this Court stated in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), "[a] tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product." *Accord*, *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1492 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986). (*see*, 37a)

In this case, THY *did not even allege* that Marquette refused to sell EKG or stress testing equipment unless the purchaser also bought recording paper. Moreover, Mr. T. Harris Young, himself, admitted he was "not aware . . . of any instances in which Marquette made the purchase of recording paper a condition of purchasing any equipment". (R19-230-31)

To avoid the consequences of this gaping hole in its legal theory, THY argues that Marquette coerced hospitals to purchase its recording paper by threatening to cancel service contracts or warranties and that this coercion is an implied or subtle form of "conditioning" or withholding of the tying products. (Pet. 10-11) This argument is made even though the alleged coercion is totally unrelated to any withholding of equipment from the purchaser (who already owned the equipment) or the conditioning of any sale of equipment on the purchase of recording paper.

No case has ever held that the coercion alone, unrelated to the withholding, the threat to withhold, or the conditional sale of the tying product, constitutes tying.[10] It is,

[10] As stated by the Appellate Court: "All the tying cases . . . concern factual situations where the defendant has allegedly withheld, or threatened to withhold, [the tying] product". (37a, n. 10)

therefore, not surprising that the cases cited by THY as being in conflict with the opinion below do not even arguably support its contention. In *Jefferson Parish*, the defendant hospitals would not provide surgical facilities unless the patients agreed to purchase anesthesiology services from the hospital's designee. In *Northern Pacific Railway*, the defendant would not sell or lease land unless the grantee or lessee agreed to purchase needed transportation services from defendant. In *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the defendant refused to license or sell feature films unless the purchaser also licensed or purchased one or more unwanted and inferior films. In *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the defendant threatened to cancel copier leases, thereby withholding and taking back the tying product, unless the lessees agreed to purchase defendant's copier supplies. (37a, n. 10) In *Heatransfer Corp. v. Volkswagenswerk A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), the defendant refused to sell automobiles to its dealers unless they agreed to purchase automobile air conditioners.

None of these cases are in conflict with the decision below. In all of them the defendant declined to sell and withheld the tying product unless the purchaser also agreed to buy the tied product. Here, the purchasers already owned the equipment when the allegedly wrongful conduct took place and THY neither alleged nor proved that Marquette ever withheld, threatened to withhold, or conditioned the sale of any equipment on the purchase of recording paper.

B. Review of the Question Presented Cannot Alter the Judgment

Certiorari should generally be denied where review will be irrelevant to the outcome of the case or where the case might be decided on other grounds. R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, 201 (6th ed. 1986). Here, THY asks this Court to review the question of whether THY demonstrated the existence of a tying arrangement. Even if THY were to prevail on that point, however, judgment for Marquette on the tying claim would still be mandatory. This is because the lower courts have already held in this case that THY failed to define the relevant markets for either the tying or the tied products, and THY does not seek review of those holdings. Without reversing those holdings, however, THY's tying claim necessarily fails under either the *per se* rule or the rule of reason and any decision by this Court on the tying question presented for review would be advisory in nature.

1. *Per Se* Rule

An element of a *per se* illegal tying violation is "that the seller have sufficient market power in the tying product market to force the buyer to accept the tied product". *Amey*, 758 F.2d at 1503; *Jefferson Parish*, 466 U.S. at 15 (seller must have power over the tying product—"usually called market power"—to force the purchaser to take the tied product).

Market power does not exist in the abstract. It can be measured only within an "area of effective competition" which is delineated by the relevant market analysis. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422-23 (11th Cir. 1984) (Evaluation of market power . . .

[is] rendered impossible in the absence of proof regarding the economic significance (or relevance) of the market"); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) (to determine market power "a court examines the relevant market").

In *Jefferson Parish*, this Court held that plaintiff had failed to prove market power over the tying product precisely because he incorrectly defined the relevant geographic market. Using the correct geographic market definition, this Court held that the defendant had only a 30% market share, which was held insufficient, as a matter of law, to allow an inference of market power. 466 U.S. at 7-8, 26.

Here, the lower courts have held that THY failed to define the relevant product market for EKG or stress testing equipment; failed to define a relevant geographic market for such equipment; and, improperly attempted to measure Marquette's market power over such equipment amongst only one class of customer—i.e. 200+ bed general hospitals. THY does not challenge or seek review of these holdings. Accordingly, a *per se* tying violation could not be found to exist, regardless of how the tying question presented for review is decided.

2. Rule of Reason

In order to prove a rule of reason tying violation, plaintiff must define the product and geographic dimensions of the tied product market and prove that competition was unreasonably restrained within it. *See, e.g., Jefferson Parish*, 466 U.S. at 29; *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 772 (11th Cir. 1983).

The courts below have already held that THY failed, as a matter of law, to properly define either the product or the geographic markets for recording paper. Again, THY neither challenges nor seeks review of those holdings. As a result, THY cannot possibly demonstrate a rule of reason tying violation in this Court.

The judgment of the Appellate Court on the tying claim cannot be reversed unless this Court were to review holdings that petitioner neither challenges nor asks this Court to review. Petitioner's request for review of the question of whether a tie was shown to exist is, therefore, a request for an advisory opinion that will not alter the judgment regardless of how the question presented is decided.

C. This Case Bears No Similarity to *Image Technical Service*

THY argues that this case is similar to *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2823 (June 17, 1991), and asks this Court to review the decision below "alongside *Kodak*". (Pet. 9, 11-12) THY is mistaken. The issues it presents for review bear no similarity whatsoever to the issue which this Court has agreed to review in *Kodak*.

In *Kodak*, the defendant, a manufacturer of copiers, sells replacement parts to customers who purchase its repair service or who service their machines themselves. Defendant refuses, however, to sell replacement parts to any customer who purchases repair service from a competing service company. That refusal is the alleged tie. The question presented by THY—whether a tie exists even though defendant does not withhold, or threaten to withhold, the tying product—is not even arguably raised in *Kodak*.

The issue which this Court granted certiorari to review in *Kodak* is whether an equipment manufacturer that lacks market power in the equipment market can, nonetheless, enjoy meaningful market power over replacement parts for that equipment. Regardless of how that issue is resolved, it will have no impact on THY's claim. Here, THY asserts that Marquette enjoys, and misused, market power in an equipment market—not a subsidiary market for the replacement parts for such equipment.

II. Reasons for Denying Review of the Tort Claim

THY requests certiorari on whether a new trial, as opposed to JNOV, should have been granted on its state law claim. As set forth below, there are three reasons for denying the writ. First, THY did not raise this "new trial" issue in the Appellate Court. Second, assuming THY's argument had any merit, its consideration would involve only the facts of this case and would be of significance only to the parties hereto. Third, THY's non-hearsay evidence, and even its hearsay evidence, was clearly insufficient to create a jury issue as to whether the elements of the state law tort were proved.

A. THY Did Not Raise The "New Trial" Issue Below

THY did not raise the question of whether a new trial, as opposed to JNOV, was appropriate until it filed its "Supplement to Suggestion of Rehearing En Banc and Petition for Rehearing". (*see*, text at n. 3, *supra.*) By failing to raise this issue during the main appeal, THY waived it. *Holley v. Seminole County School Dist.*, 763 F.2d 399, 400-401 (11th Cir. 1985) (Court "will not entertain . . . questions presented for the first time in petition for rehearing"); *Stanley Educational Methods, Inc.*

v. The Becker C.P.A. Review Course, Inc., 539 F.2d 393, 394 (5th Cir. 1976) (issue raised up for the first time on petition for rehearing will ordinarily not be considered).

Issues which are not preserved in the Appellate Court are not the proper subject of a writ of certiorari. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955) (writ of certiorari dismissed as improvidently granted: "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here"); *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"). Because THY failed to preserve the "new trial" issue below, it is not suitable for a writ of certiorari now.

B. The Question Presented on the Tort Claim is of No General Significance

THY claims that the Appellate Court applied an incorrect standard of appellate review. (Pet. i, 14) The Appellate Court, however, set forth the legally correct standard of appellate review and THY does not claim that the Court misstated the law in any respect.[11] What THY

[11] The Appellate Court stated that "a motion for JNOV tests the sufficiency of the evidence supporting a jury verdict". (35a) Quoting from *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1556, 1558 (11th Cir. 1988), the Court further held that the evidence must be considered "in the light and with all reasonable inferences most favorable" to THY; that a motion for JNOV should be granted only if reasonable people could not arrive at a contrary verdict; and, that where there is substantial conflicting evidence as to which reasonable people might differ, JNOV should be denied. (36a) Finally, the Court held that evidentiary rulings are discretionary and will not be disturbed absent a clear showing of abuse of discretion. (36a)

actually objects to is not the standard of review employed by the Appellate Court, but the manner in which the facts of this particular case were applied to that undisputed legal standard.

The manner in which the facts of this particular case were applied to an admittedly correct legal standard is not, however, of any general legal significance. It is a purely fact-bound issue which will only resolve this particular dispute and be of consequence only to the immediate parties. Indeed, THY does not even argue to the contrary. Accordingly, THY's petition for certiorari on the state law tort claim should be denied.

C. The Evidence Was Insufficient Under Florida Law to Establish Tortious Interference

The question of whether JNOV was proper on the state law claim depends on the elements of the alleged tort under Florida law and "the sufficiency of the evidence" to prove those elements. (35a, 51a) If no reasonable juror could conclude that THY proved the requisite elements of the region-wide tort which it alleged, then JNOV for Marquette was proper and the exercise of this Court's supervisory power is unnecessary. As explained below, even if THY's hearsay evidence were admissible (which THY does not even contend), no reasonable juror could conclude that THY proved its claim. When the hearsay evidence is properly excluded, the propriety of JNOV for Marquette becomes virtually indisputable.

1. JNOV Is Required Even If the Hearsay Testimony Is Considered

Florida law does not allow region-wide tortious interference to be inferred from limited proof of conduct pertain-

ing to only a small number of customers. For example, in *Aldon Industries, Inc. v. Don Myers & Associates, Inc.*, 517 F.2d 188 (5th Cir. 1975),[12] plaintiff claimed that its ability to sell carpet to 67 school boards in Florida was destroyed by defendant's tortious conduct. Plaintiff presented evidence, however, of only two instances where a school board had declined to do business with it on account of defendant's wrongful conduct. The Fifth Circuit, applying Florida law, reversed a judgment for plaintiff, and specifically held that the evidence was insufficient, as a matter of law, to permit the jury to infer the existence of a statewide tort:

> Since [plaintiff] sought recovery for damages resulting from statewide loss of sales, it follows that it must prove statewide rather than localized injury. Statewide injury to its reputation and consequent loss of sales cannot be inferred from [plaintiff's] removal from the bidding lists of two out of a total of sixty-seven county school boards.

517 F.2d at 191.

Consistent with *Aldon*, the Florida Court of Appeals held in *Lake Hospital, Inc. v. Silversmith*, 551 So. 2d 538 (Fla. App. 1989), that defendant was entitled to a directed verdict on a tortious interference claim because plaintiff did not prove defendant "specifically interfered with particular relationships." *Id.* at 545. *See also, Union Carbide Corp. v. Tarancon Corp.*, 682 F.Supp. 535, 543 (N.D. Ga. 1988) (defendant granted summary judgment on tortious interference claim because plaintiff did not prove

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[12] The Eleventh Circuit Court of Appeals has adopted the law of the Fifth Circuit Court of Appeals prior to October 1, 1981, as controlling precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

defendant "actually contacted [plaintiff's] current or prospective customers").

In the current case, THY, like the plaintiff in *Aldon*, has asserted region-wide tortious conduct. As the Appellate Court held, however, THY "only introduced evidence regarding [tortious] statements by Marquette employees at [seven] hospitals". (Pet. 46a; *see also* 49a, 52a, n.24) Thus, the legal deficiency in THY's proof is identical to the deficiency found in *Aldon*. Just as proof pertaining to only two customers was insufficient to create a jury issue as to the existence of a statewide tort in *Aldon*, proof pertaining to only seven customers is insufficient to create a jury issue as to the existence of a nine state region-wide tort in this case. Thus, even if THY's hearsay evidence is considered, under Florida substantive law, a jury would not be allowed to infer the existence of a region-wide tort from the limited evidence submitted by THY, and JNOV for Marquette was clearly required.

2. JNOV is Even More Clearly Mandated When the Hearsay Evidence is Excluded

THY does not seek review of the hearsay rulings below. Once the hearsay evidence is properly excluded from consideration, Marquette's right to JNOV under Florida law becomes virtually indisputable. This is because the only remaining evidence of any allegedly tortious conduct is the testimony of David Taylor. As the Appellate Court held, that evidence is not "sufficient to support a rational jury determination of tortious interference with business" because Taylor admitted he had no knowledge of any particular tortious statement being made to any particular customer. (51a-52a, n.24)

Thus, if one looks only to the admissible evidence, no reasonable juror could ever believe that THY proved that Marquette "specifically interfered with particular relationships," as required by Florida law. *Lake Hospital*, 551 So. 2d at 545. As a result, the evidence was insufficient to support a jury verdict and the entry of JNOV for Marquette was required. (35a-36a)

None of the authorities cited by petitioner are inconsistent with the substantive law of Florida as discussed above. Indeed, THY's authorities are not even pertinent to the question of whether the evidence adduced at trial, admissible or inadmissible, was sufficient to support a jury verdict under controlling Florida law. Certainly, none of THY's authorities holds that an appellate court cannot reverse the denial of JNOV for a defendant where the proof at trial is legally insufficient to support a jury verdict.[13]

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing that there are special or important reasons why a writ of certiorari should issue in this case. The tying decision below does not conflict with any decision of this Court or any other Court

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[13] THY cites *Deas v. Paccar, Inc.*, 775 F.2d 1498 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940) and 5A, Moore's Fed. Prac., 2d ed. §50.03 (2) (Pet. 16). *Deas* merely holds that where the trial judge granted defendant a new trial, but that plaintiff requested JNOV be entered instead so that a prompt appeal could be taken, that the plaintiff had waived a new trial. *Montgomery Ward* merely holds that when a District Court grants JNOV, it should conditionally rule on the motion for a new trial. Moore's treatise merely states that JNOV should be decided as a matter of law, whereas a motion for a new trial is discretionary.

of Appeals. Even if the tying issue raised by THY were reviewed and reversed, judgment for respondent would nonetheless be mandatory, and, contrary to petitioner's contention, the issues here bear no similarity to issues raised in *Image Technical Service*. As to the tort claim, the issue presented by THY was neither raised nor preserved below; it is purely dependent on the facts of this case; is of no general significance; and, tests only the sufficiency of the evidence to support a pendant state law claim. The petition should, accordingly, be denied in all respects.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3252
No. 90-3364

T. HARRIS YOUNG & ASSOCIATES, INC.,
a Florida corporation,

Plaintiff-Appellant,
Cross-Appellee,

v.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

MOTION FOR LEAVE TO FILE SUPPLEMENT TO SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

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& Associates, Inc.

MOTION FOR LEAVE TO SUPPLEMENT SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

T. Harris Young & Associates, Inc. moves the Court for leave to file the Supplement to its Suggestion of Rehearing En Banc and Petition for Rehearing of which a copy is in the addendum to this motion.

The proposed Supplement consists of one page and its inclusion with the Suggestion would not materially enlarge its length which has been allowed to be 20 pages. The purpose of the Supplement is, as it states, to bring the Court's attention that its ruling that inadmissable evidence was allowed by the district court could only support a ruling that there was judicial error which would warrant a new trial.

This motion is made in the interest of justice, and the same motion has not been previously made.

A copy of this motion has been served upon all counsel of record.

Respectfully submitted this 27th day of June, 1991.

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& Associates, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail, this 27th day of June, 1991, to Paul E. Slater, Esquire, 55 West Monroe, Suite 3300, Chicago, Illinois 60603; Melvin S. Newman, Esquire, 222 S. Riverside Plaza, Suite 2700, Chicago, Illinois 60606; Davisson F. Dunlap, Esquire, and William D. Palmer, Esquire, Post Office Box 1171, Orlando, Florida, 32802.

Eli H. Subin

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3252
No. 90-3364

T. HARRIS YOUNG & ASSOCIATES, INC.,
a Florida corporation,

Plaintiff-Appellant,
Cross-Appellee,

v.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

MEMORANDUM OF MARQUETTE ELECTRONICS, INC. IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

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MARQUETTE ELECTRONICS,
INC.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the defendant-appellee, cross-appellant, Marquette Electronics, Inc., certifies that the following is a complete list of all persons and organizations having an interest in the outcome of this case as required by 11th Cir. R.28-2(b):

The Honorable Robert R. Merhige, Jr.,
United States District Judge for the
Eastern District of Virginia

T. Harris Young & Associates, Inc.

Marquette Electronics, Inc.

Marquette N. Ireland, Ltd.

Marquette Gas Analysis Corp.

Marquette Electronics GB, Ltd.

Marquette Espana S.A.

Marquette Electronics SARL

Marquette Electronics GMBH

Marquette Benelux

Marquette Italia S.A.

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Electronics, Inc.

On May 20, 1991 this court issued an opinion affirming the grant of Judgment NOV against plaintiff, T. Harris Young & Associates ("THY") on its Sherman Act claims and ordering that Judgment NOV be entered on THY's tortious interference with business relations claim. On May 28, 1991 THY filed a motion before this Court to expand the length of a petition for rehearing to twenty pages. The motion was unopposed by defendant Marquette Electronics, Inc. ("Marquette") and was granted by this Court. On June 5, 1991 THY timely filed its Suggestion of Rehearing En Banc and Petition for Rehearing ("Petition") which was twenty pages in length.

On June 21, 1991 THY submitted to this Court its "Supplement to Suggestion of Rehearing En Banc and Petition for Rehearing" ("Supplement"). The Supplement does not cite any authority which was not available at the time the petition for rehearing was due, which was on June 10, 1991. Indeed, the Supplement does not cite any authority dated after 1989. The Supplement raises a new argument not made in the Petition (and, in fact, not previously made on appeal).

On June 28, 1991 after being advised by the Clerk's Office that it would have to seek Leave of Court to file its Supplement, THY filed a Motion For Leave To File Supplement To Suggestion Of Rehearing En Banc and Petition For Rehearing. In its motion, THY offers no explanation as to 1) why its new argument was not included in the original Petition; 2) why it should be allowed to raise

new arguments after the time for filing its petition for rehearing has run; and 3) why it should be allowed to submit additional material exceeding the twenty page limit which it has been allowed.

Marquette respectfully suggests that the material in THY's supplement has not been timely filed by the June 10, 1991 due date and exceeds the twenty page limitation granted to THY. As THY has offered no explanation for why this material was not timely filed; included in the original petition; and was not set forth within the twenty page limitation, the motion for leave to file the Supplement should be denied.

Respectfully submitted this 1st day of July 1991.

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ATTORNEYS FOR
DEFENDANT-APPELLEE
CROSS-APPELLANT
MARQUETTE ELECTRONICS,
INC.

CERTIFICATE OF SERVICE

Paul E. Slater, an attorney, hereby certifies that he caused a true and correct copy of the above and foregoing **Memorandum of Marquette Electronics, Inc. In Opposition To Motion For Leave To File Supplement To Suggestion Of Rehearing En Banc and Petition For Rehearing** to be served upon

Eli H. Subin
John M. Brennan
SUBIN, SHAMS, ROSENBLUTH & MORAN, P.A.
111 North Orange Avenue
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by ECC Overnight Courier this 1st day of July, 1991.

Paul E. Slater

[Filed with the U.S. Court of Appeals,
Eleventh Circuit on September 10, 1991)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 90-3252 and 90-3364

T. HARRIS YOUNG & ASSOCIATES, INC.,
a Florida corporation,

Plaintiff-Counter
Defendant-Appellant/
Cross-Appellee,

versus

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant-Counterclaim-
Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

O R D E R:

Cross-Appellee, T. Harris Young & Associates, Inc.'s supplement to suggestion of rehearing en banc and petition for rehearing is DENIED.

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE